STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 25, 2008
v	No. 279678 Berrien Circuit Court
DAVID FRANCIS FLOCK, Defendant-Appellant.	LC No. 2006-412403-FH

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant David Flock appeals as of right his jury convictions for fourth-degree criminal sexual conduct (CSC IV)[1] and assault and battery.[2] The trial court sentenced Flock to 90 days in jail and five years' probation for the CSC IV conviction and to 90 days in jail for the assault and battery conviction. We affirm.

I. Basic Facts And Procedural History

Flock's convictions arose out of an incident that occurred on January 20, 2006, at the home of Tonya Ward. Ward had been best friends with Flock's wife, Heather Flock, for about ten years. Ward, who had recently separated from her husband, had just moved into a new house, and invited the Flocks over for a visit. While showing the Flocks around the house, Ward showed them her bedroom, where her two daughters, the victim (13 years of age) and a second daughter (eight years of age) were on the bed, watching a movie. Flock ran and jumped onto the bed and then remained in the bedroom talking to the girls while Ward and Heather Flock went into the kitchen to talk. While Flock was talking to the victim, he kept putting his hand on the victim's leg, near her knee. The victim, however, stated that this contact did not alarm her. Flock then went to the kitchen to talk and drink with his wife and Ward.

Sometime thereafter, Ward was sitting on her kitchen counter when Flock began rubbing his hand on her thigh. According to Ward, Flock kept trying to stick his hand up her sweater and

[1] MCL 750.520e(1)(a).

[2] MCL 750.81(1).

unhook her bra strap. Ward tried to pull away from him, but Flock nevertheless unhooked her bra. Ward stated that she pushed Flock away and told him to stop. Ward told Heather Flock that she needed to control her husband, but Heather Flock replied that she could not control him. Ward moved away, and Flock stopped touching her. At trial, Flock admitted rubbing Ward's thigh, but denied putting his hand up her sweater or unhooking her bra. Heather Flock denied that Ward tried to move away from Flock, told Flock to stop, or told her to control her husband.

According to Ward, Heather Flock got up to go to the bathroom, and Flock then whispered in her ear that they should get together and kissed her neck. Ward testified that she told Flock "no" and became angry. Ward then turned around and saw Heather Flock standing in the kitchen doorway. Heather Flock became upset and told Flock that it was time to go. Heather Flock ran out to her car, and Ward followed her. Ward then explained to Heather Flock what had happened. Heather Flock indicated that she believed Ward and that she had heard the conversation. Heather Flock also told Ward that this was not the first time that Flock had engaged in such behavior and that he was just fired from his job for the same thing.

While Ward went to talk to Heather Flock in the car, Flock went back to the bedroom and sat between Ward's daughters on the bed. Flock asked the victim if he could brush her hair, and she said "yes." Flock was sitting on the bed with his back against the headboard, so he helped scoot the victim into a position in front of him to brush her hair. After brushing the victim's hair, Flock began rubbing his hands up and down her arms, which "weird[ed] [her] out." Flock went back to brushing the victim's hair and then began rubbing her lower abdomen, which made the victim feel uncomfortable and scared. According to the victim, Flock then moved his hand lower, "maybe an inch or so below the belt," to the area over her pubic hair. The victim stated that while "[h]is hand was still down there," Flock pulled her hair back, smelled it, and then kissed the side of her neck. The victim stated that Flock then said, "I bet none of your little boyfriends could touch you like this." The victim testified that, during the encounter, Flock's hand always remained over her clothes and that he did not touch her vaginal area or buttocks. The victim then told Flock that she had to get ready for bed, but she instead went into the bathroom and cried. Several minutes later, the victim came out of the bathroom and told her sister to get ready for bed in order to get her away from Flock.

Flock testified that the victim had misinterpreted the alleged incident. He stated that he only placed his hands on the victim's lower abdomen to "help[ ] guide her into position" in order to brush her hair. He also stated that he did not rub her arms but merely placed his hands on her shoulders and then asked her if she was "all set and centered" to have her hair brushed. Flock claimed that while brushing her hair, he said, "I bet your boyfriends don't *brush your hair* like this," not "I bet your boyfriends don't *touch you* like this." As for kissing the victim's neck, Flock said that he merely leaned in to smell the fragrance in her hair and that she may have perceived the sniff as a kiss because his nose may have touched her neck area.

The victim later told Ward what Flock had done to her. After the incident, Flock told Ward that it was all a misunderstanding. Flock said that the victim had misunderstood what happened and that what he did to Ward in the kitchen was just a joke.

Following the trial, the jury convicted Flock as stated above, and Flock's appeal followed.

II. Unsolicited Testimony

A. Standard Of Review

Flock argues that the trial court abused its discretion when it did not grant a mistrial after Ward testified that Heather Flock revealed that Flock was fired from his job for "the same thing." Flock asserts that the prosecutor solicited this testimony and that it prejudiced him by introducing into the case a claim that this was not the first time he had engaged in sexual misconduct. He argues that once the testimony was uttered, there was no way to correct the damage to him, so no curative instruction was requested. Flock concludes that the statement deprived him of a fair trial and, thus, the trial court's denial of a mistrial was an abuse of discretion.

We will not reverse a trial court's grant or denial of a mistrial on appeal in the absence of an abuse of discretion.[3] To constitute an abuse of discretion, the trial court's denial must have fallen outside the principled range of outcomes.[4]

B. The Prosecutor's Question And Defense Counsel's Objection

At trial, Ward testified about her conversation in the car with Heather Flock concerning Flock's apparent advances toward her. Specifically, the prosecutor asked Ward on direct examination, "And did you explain your side of what had just occurred?" And Ward responded to the prosecutor's question as follows: "Yes. And she [Heather Flock] told me that she believed me, that she had heard the conversation. And she said, Tonya, do you really think this is the first time this has happened? He [Flock] just got fired from his job for the same thing.'" Defense counsel immediately objected, arguing that the testimony was inadmissible under MRE 404(b) as uncharged prior misconduct. Defense counsel further argued that because the jury had already heard the inadmissible evidence, there was no way to cure the error. Thus, defense counsel also moved for a mistrial.

C. The Trial Court's Decision

The trial court sustained defense counsel's objection to the admissibility of the statement, but denied the motion for a mistrial. The trial court then gave counsel the option of requesting a curative instruction. However, defense counsel chose, as a matter of strategy, not to request a curative instruction because he believed that to do so would only emphasize the very statement that he did not want the jury to consider.

D. Legal Standards

"To find error requiring reversal, a trial court's denial of a mistrial must have been so gross as to have deprived the defendant of a fair trial and to have resulted in a miscarriage of

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[3] *People v Vettese*, 195 Mich App 235, 245-246; 489 NW2d 514 (1992).

[4] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

justice."[5] As a general rule, a prosecution witness's unresponsive, volunteered answer to a proper question does not justify a mistrial, unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony.[6]

E. Applying The Standards

In this case, it was while answering the prosecutor's question concerning what Ward had said to Heather Flock that Ward volunteered that Heather Flock told her that Flock had just been fired for the "same thing." There can be no dispute that the prosecutor's question to Ward was proper. The prosecutor merely asked what Ward had said to Heather Flock, not what Heather Flock said to Ward. Moreover, Flock does not suggest that the prosecutor expected the improper response. To the contrary, at trial, defense counsel conceded that the prosecution did not purposely elicit the statement. Further, the prosecutor confirmed that he carefully instructed all of his witnesses about what they could not bring up and that he did not solicit the statement. Because the mention of Flock's firing was not elicited by the prosecutor but was instead volunteered in response to a proper question, that brief incidental mention did not warrant a mistrial.

Nor do we find error in the trial court's not providing the jury with a curative instruction. Had defense counsel accepted the trial court's offer to provide such an instruction, the court would have been obliged to do so. However, the failure of defense counsel to request a curative instruction regarding a gratuitous answer waives any claim of mischief worked by reason of the unexpected and volunteered response.[7]

On the facts before this Court, we cannot conclude that the trial court abused its discretion in denying the motion for mistrial.

III. Sufficiency Of The Evidence

A. Standard Of Review

Flock argues that the prosecution failed to present sufficient evidence to prove he touched the victim with a sexual purpose or in any of the areas prohibited by statute. He asserts that although the evidence, even when viewed in the light most favorable to the prosecution, shows that he touched "almost to the crotch" area of the victim, that area is not an "intimate part" as the statute defines it. He further argues that even if he touched an area that the statute prohibits, there was insufficient evidence to prove that the touching was for a sexual purpose.

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[5] *Vettese*, *supra* at 246.

[6] *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995); *People v Barker*, 161 Mich App 296, 305-306, 307; 409 NW2d 813 (1987).

[7] *Barker*, *supra* at 307. See also *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999), overruled on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007).

When reviewing a challenge to the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution and determine whether a reasonable trier of fact could find that all of the elements of the crime were proven beyond a reasonable doubt.[8] We review de novo issues regarding the sufficiency of the evidence,[9] as well as issues of statutory interpretation.[10]

B. Statutory Interpretation

(1) The Purposes Of Statutory Interpretation

The purpose of statutory interpretation is to give effect to the intent of the Legislature.[11] If the plain language of the statute is unambiguous, we deem the Legislature to have intended the meaning clearly expressed and we must enforce the statute as written.[12] But judicial construction is permitted where reasonable minds could differ as to the meaning of the statute.[13] "Where ambiguity exists, this Court seeks to effectuate the Legislature's intent by applying a reasonable construction based on the purpose of the statute and the object sought to be accomplished."[14]

(2) Defining The Statute

The statute under which Flock was convicted provides that

> [a] person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and . . . [t]hat other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person.[15]

To convict a defendant under this statute, the prosecution must prove beyond a reasonable doubt that the defendant engaged in "sexual contact," which includes the intentional touching of the victim's intimate parts or the clothing covering the immediate area of the victim's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, or done for a sexual purpose.[16] "'Intimate parts'

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[8] *People v Petrella*, 424 Mich 221, 268; 380 NW2d 11 (1985).

[9] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

[10] *Babcock*, *supra* at 253.

[11] *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

[12] *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006).

[13] *People v McLaughlin*, 258 Mich App 635, 673; 672 NW2d 860 (2003).

[14] *Id*.

[15] MCL 750.520e(1)(a).

[16] MCL 750.520a(q).

includes the primary genital area, groin, inner thigh, buttock, or breast of a human being."[17] The relevant statute does not define "primary genital area" or "groin," and we have found no definitions existing in case law.

(3) Construing The Words At Issue Here

At issue here is the meaning of the terms "primary genital area" and "groin." Where words are statutorily undefined, a court may reference dictionary definitions to determine the ordinary meanings of those words.[18] We should accord words and phrases their ordinary, plain meanings, taking into account the context in which they are used.[19] And any such interpretation must be reasonable.[20]

a. "Primary Genital Area"

As stated, the definition of "intimate parts" includes "the primary genital area." The *Random House Webster's College Dictionary* defines "genital" as "of or pertaining to the sexual organs."[21] The *Random House* dictionary also defines "genitalia" as "the organs of reproduction, esp. the external organs." The *Webster's New Twentieth Century Dictionary* similarly defines "genitals" as "the parts of the human body which are the immediate instrument of generation; especially, the external sexual organs."[22] Additionally, the *Stedman's Medical Dictionary* defines "genital" as "[r]elating to the primary female or male sex organs or genitals."[23] According to this same dictionary, "genitalia" are the "genital organs" and specifically, the "external female genital organs" are the "vulva and clitoris."

The *Random House Webster's College Dictionary* defines "primary" as "first in rank or importance" or "immediate or direct; not involving intermediate agency." The *Webster's New Twentieth Century Dictionary* defines "primary" as "first in importance; chief; principal." And the simple basic synonyms of the word "primary" include: "chief, main, principal, fundamental" and "basic."[24] By including the term "primary," we conclude that the Legislature was limiting, rather than expanding, the term "genital area." Use of a word meaning "immediate," "direct," and "principal," suggests that the Legislature meant to include *only* the actual genitalia rather

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[17] MCL 750.520a(e).

[18] *Tomecek v Bavas*, 276 Mich App 252, 266; 740 NW2d 323 (2007).

[19] *People v Barrera*, 278 Mich App 730, 736-737; 752 NW2d 485 (2008).

[20] See *Grebner v Michigan*, 480 Mich 939, 941; 744 NW2d 123 (2007); *Omdahl v W Iron Co Bd of Ed*, 478 Mich 423, 428 n 1; 733 NW2d 380 (2007).

[21] *Random House Webster's College Dictionary* (1997).

[22] *Webster's New Twentieth Century Dictionary, Unabridged Second Edition-Deluxe Color* (1983).

[23] *Stedman's Medical Dictionary, 26th Edition* (1995).

[24] *Random House Webster's College Thesaurus* (1998).

than any intermediate or secondary area. The Legislature is presumed to intend the words used in the statute.[25]

Here, the victim testified that Flock touched her lower abdomen in her pubic hair area and specifically denied that he touched her "vaginal area." Therefore, we conclude that the area where Flock touched the victim was not the "primary genital area" because Flock did not have direct contact with a sexual organ or "genitalia."

b. "Groin"

But the definition of "intimate parts" also includes the "groin." The *Random House Webster's College Dictionary* defines groin as "the fold or hollow where the thigh joins the abdomen" and "the general region of this fold or hollow." Similarly, *The American Heritage Dictionary* defines "groin" as "[t]he crease at the junction of the thigh and the trunk, *together with the adjacent area*."[26]

The *Random House Webster's College Dictionary* defines "pubic" as "of, pertaining to, or situated near the pubis or the pubes." "Pubis" is "one of the paired anterior bones of the vertebrate pelvic girdle,"[27] or "the forward portion of either of the hipbones, at the juncture forming the front arch of the pelvis."[28] Further, "pubes" is (1) "the lower part of the abdomen, esp. the area between the right and left iliac regions," or (2) "the hair appearing on the lower part of the abdomen at puberty."[29] Notably, the Latin etymologies for both "pubis" and "pubes" indicate that the words are synonymous with "groin."[30]

Considering the synonymous meanings of "groin" and "pubic," we conclude that the statute prohibits touching of the area covered by pubic hair, which, under a reasonable interpretation of its ordinary meaning, is part of the "groin," as the area adjacent to the groin.[31] Moreover, when taken in the context of the statute, considering that the term "intimate parts" also includes the inner thigh, it would be unreasonable to conclude that the area covered by pubic hair is not a similar "intimate part."

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[25] *Lash v Traverse City*, 479 Mich 180, 189; 735 NW2d 628 (2007).

[26] *The American Heritage Dictionary, Second College Edition* (1985) (emphasis added).

[27] *Random House Webster's College Dictionary*.

[28] *The American Heritage Dictionary, Second College Edition*.

[29] *Random House Webster's College Dictionary*.

[30] *The American Heritage Dictionary, Second College Edition* ("[NLat. (*os*) *pūbis*, (bone) of the groin < pubes, groin]"); *Random House Webster's College Dictionary* ("[1560-70; < L *pūbēs* adulthood, pubic hair, groin]").

[31] *The American Heritage Dictionary, Second College Edition*.

C. The Evidence

To prove that Flock violated MCL 750.520e(1)(a), the prosecution had to prove that Flock engaged in sexual contact with the victim, who was "at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than" the victim. The evidence undisputedly established that the victim was 13 years old and that Flock was more than five years older than the victim.

Viewing the evidence in the light most favorable to the prosecution, the evidence shows that Flock touched the victim in her pubic hair area over her clothes. The victim confirmed that her pubic hair is just above the top of her vagina. The prosecutor asked the victim to demonstrate for the jury where Flock rested his hand. The trial court, describing the victim's demonstration, stated "lower abdomen area down to . . . almost to the crotch area of her pants is where she's touching." Further, Flock touched the clothing covering the victim's lower abdomen in the middle of her stomach, not on the sides. According to our interpretation of the statute, the area that Flock touched was within the general region of the groin and thus a part of the "groin." Thus, the evidence was sufficient to prove sexual contact with the victim's intimate parts. It does not matter whether the victim's testimony was corroborated[32] or that her testimony could be considered inconsistent at times.[33]

We further conclude that the evidence was also sufficient to prove that the touching or contact was done with a sexual purpose or for sexual arousal or gratification. Intent may be inferred from all the facts and circumstances.[34] Again, viewing the evidence in the light most favorable to the prosecution, the evidence shows that Flock had been drinking. While in the kitchen, Flock made sexual advances towards Ward, which she rebuffed. Heather Flock witnessed the advances and became upset, and Ward followed her out to her car to comfort her. When Ward and Heather Flock were outside, Flock went into the bedroom and brushed the victim's hair. While brushing her hair, he rubbed his hands up and down her arms, rubbed her lower abdomen, and went lower to her pubic hair area. With his hand still over her pubic hair area, he pulled her hair back, smelled it, kissed the side of her neck, and then told her "I bet none of your little boyfriends could touch you like this." These actions all support the inference that the touching was for a sexual purpose, or for sexual arousal or gratification. The fact that Ward had been drinking and that Ward had just rebuffed him also supports the inference that Flock entered the bedroom to touch the victim in order to satisfy his sexual urge, an urge that Ward had just denied. Thus, we conclude that the evidence was sufficient to prove sexual purpose.

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[32] MCL 750.520h.

[33] *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999) (stating that the weight and credibility of the evidence is for the trier of fact).

[34] See, e.g., *People v Evans*, 173 Mich App 631, 634-635; 434 NW2d 452 (1988).

IV. Prosecutorial Misconduct

A. Standard Of Review

Flock argues that during closing argument the prosecutor impermissibly interjected his personal beliefs about Flock's guilt, instructed the jury that the case was about who could be believed rather than whether each element had been proven beyond a reasonable doubt, invoked juror sympathy, and denigrated Flock. According to Flock, the prosecutor's misconduct deprived him of a fair trial guaranteed by the due process clauses of the state and federal constitutions.

We review de novo preserved claims of prosecutorial misconduct.[35] We review unpreserved claims for plain error affecting a defendant's substantial rights.[36] To avoid forfeiture under the plain error rule: (1) the error must have occurred; (2) the error must have been plain, meaning clear or obvious; (3) and the plain error had to prejudice the defendant by affecting the outcome of the lower court proceedings.[37] However, even when we find plain error, we will reverse only when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of a defendant's innocence or where the error resulted in an actually innocent defendant's conviction.[38] Further, we review claims of prosecutorial misconduct on a case-by-case basis, evaluating each alleged improper remark in context.[39]

B. Burden Shifting

Flock argues that the prosecutor shifted the burden of proof by telling the jury that the case was a credibility contest between the victim and him. The prosecutor, in closing argument, told the jury:

> And by the way, if [the victim] were going to lie about this, again, what is her motive?
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> We asked [the victim] are you making this up? She said, no. Are you telling the truth? She said, yes. Conversely why would David Flock lie? He's the defendant. He's got everything to lose.

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[35] *People v Craig Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

[36] *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

[37] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[38] *Id*.

[39] *People v Tommy Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

Although "[a] prosecutor may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness," a prosecutor may argue from the facts that the defendant or a witness is worthy or not worthy of belief.[40] And the prosecutor may attack the weakness of a defendant's case.[41]

Here, the prosecutor claimed no special knowledge. The prosecutor simply argued from the evidence that the victim should be believed because she had no motive to lie and she said that she was telling the truth at trial. The prosecutor did not suggest that Flock had anything to prove. In fact, the prosecutor told the jury "[Flock] does not have to prove anything." The prosecutor reminded the jury in its closing argument that its "burden is beyond a reasonable doubt." Because a prosecutor is permitted to argue that a witness should be believed based on the facts, and the prosecutor did not shift the burden of proof, the prosecutor's remark here was not misconduct.

Further, even if the jury misinterpreted the prosecutor's comment, the trial court's instructions cured any alleged prejudice to Flock.[42] The trial court instructed the jury,

> It is my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something different about the law, follow what I say. . . . A person accused of a crime is presumed to be innocent . . . . This presumption continues throughout the trial and entitled the defendant to a verdict of not guilty unless you're satisfied beyond a reasonable doubt that he is guilty. . . . The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or anything.

We conclude that there was no plain error and that, even if there was error, the error did not prejudice Flock as it was cured by the trial court's instructions to the jury.

Flock also argues that the prosecutor shifted the burden when he stated: "And really it's going to come down to [the victim] versus [Flock]." Defense counsel objected, but the trial court overruled the objection. Because the issue was preserved, we review to determine whether Flock received a fair and impartial trial.[43] Because no one other than Flock and the victim witnessed the alleged touching of her lower abdomen, the facts of the case support the prosecutor's statement that the verdict boiled down to a credibility contest between the victim and Flock. In a CSC prosecution, the victim's testimony need not be corroborated.[44] The prosecutor did not state that one was more credible than the other based on his own special knowledge or that Flock

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[40] *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005).

[41] *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

[42] *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (stating that curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions).

[43] *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005).

[44] MCL 750.520h.

needed to prove anything. Therefore, there was no prosecutorial misconduct. We conclude that Flock was not denied a fair and impartial trial on these grounds. And, as previously discussed, the trial court's instructions further ensured that Flock's trial was fair.

C. Juror Sympathy

Flock challenges the prosecutor's alleged invocation of jury sympathy for the victim based on the prosecutor's references to her as a victim with no reason to lie and the prosecutor's alleged misrepresentation of the facts of the case. Specifically, the prosecutor stated in rebuttal argument:

> Mr. Parish [defense counsel] says, look, [the victim's] all over the board on this time thing. I agree. She was. Is that surprising to you? Do you expect a 13 year old girl who was in the privacy of her mother's bedroom, in the safety of her mother's home, who was ready to go to bed and watching TV with her sister, who has now been touched between the legs and in this area over her pubic hair by a family friend is going to keep track of the number of minutes, exactly what was said the complete order of how things went, or is she going to be shocked like she said she was? Scared like she says she was?

Defense counsel failed to object to this statement at trial.

At the outset, we note that the prosecutor's statement that the victim was "touched between the legs" was improper. A prosecutor may not make a factual statement to the jury that is not supported by the evidence.[45] And, here, the evidence, viewed in the light most favorable to the prosecution, shows that Flock touched the victim over her clothes on her lower abdomen in her pubic hair area. There was no evidence that Flock touched her "between the legs." Because the evidence did not support the factual assertion, plain error occurred.

But although a plain error existed, it did not affect Flock's substantial rights. The evidence made it very clear to the jury that Flock never touched the victim between the legs. During trial, the victim demonstrated for the jury how Flock moved his hand and how far his hand went. The trial court described the victim's demonstration, stating that she was touching "[t]he lower abdomen area down to . . . almost the crotch area of her pants[.]" In response to the prosecutor's questioning, the victim stated that Flock's fingers touched the area of her pubic hair, over her clothes. During cross-examination, defense counsel elicited from the victim that Flock never touched her underneath her clothes and never touched her vaginal area. On redirect, the prosecutor asked the victim what the phrase "vagina area" meant. The victim said that the vagina area is her "actual vagina." The victim then reconfirmed that Flock's hand "wasn't touching [her] vagina at all." The prosecutor then asked "And is your pubic hair just above the top of your vagina?" to which the victim replied "Yes."

[45] *Unger*, *supra* at 241.

After closing arguments, the trial court reminded the jury that it had "taken an oath to return a true and just verdict, based only on the evidence and my instructions on the law." The trial court went on to explain that the "lawyer's statements and arguments are not evidence" and neither are the "lawyer's questions to witnesses" except "as they give meaning to the witnesses' answers." As noted above, instructions are presumed to cure most errors and jurors are presumed to follow their instructions.[46]

The clarity and exhaustiveness of the evidence at trial regarding where Flock touched the victim, along with the trial court's instructions, rendered the prosecutor's use of the term "between the legs" inconsequential to the jury's verdict. Moreover, Flock could have made a timely objection to the challenged statement and requested an instruction at the time to cure the error.[47] Thus, we conclude that the error did not affect Flock's substantial rights.

We also conclude that the prosecutor's remarks did not invoke juror sympathy. A prosecutor may not invoke juror sympathy for the victim.[48] Flock argues the prosecutor "repeatedly evoked sympathy for the complainant when he kept referring to [the victim] as being a victim and having no reason to lie." However, viewed in their proper context, none of the challenged arguments were improper invocations of juror sympathy. Rather, the prosecutor was exercising his proper role as an advocate by arguing that his witness, the victim, was more credible than Flock based on the facts in evidence.[49] In addition, we are to consider a prosecutor's comments in light of defense counsel's comments.[50] The prosecutor made a rebuttal comment to respond to defense counsel's suggestion that the victim's inconsistent testimony showed that she was lying and that Flock was innocent. The prosecutor explained that the victim was telling the truth, but that some of her testimony was inconsistent because she was shocked by what Flock did to her. Further, as the prosecutor stated, the victim was only 13 at the time of the touching and by the time the trial occurred, a significant amount of time had elapsed. These comments did not appeal to the jury to convict Flock out of sympathy. And, even if they could marginally be construed in that manner, the trial court also instructed the jury to decide the case on the evidence and the law and not on sympathy or prejudice.

D. Denigrating Defendant

Flock contends that the prosecutor denigrated him both personally and professionally. In particular, he points to the prosecutor's statement that:

> I'm going to the issue of the last witness. The last witness was David Flock, a salesman. And today he was selling you a story. Trained in the art of putting a

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[46] *Unger, supra* at 234-235.

[47] See *Callon, supra* at 329.

[48] *Unger, supra* at 237.

[49] *McGhee, supra* at 630.

[50] *Unger, supra* at 238.

> spin on something, and that's what he did. . . . Selling his story. And what does he tell us? This was a misunderstanding. A misunderstanding?

Although a prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks,"[51] a prosecutor may argue that a witness is not credible based on the facts.[52] "[T]he prosecutor is permitted, as an advocate, to make fair comments on the evidence, including arguing the credibility of witnesses to the jury when there is conflicting testimony and the question of [the] defendant's guilt or innocence turns on which witness is believed."[53] Further, a prosecutor is not required to assert his theory of the case in the blandest possible terms.[54]

Here, credibility was the determining factor: the jury had a clear choice between believing the victim and believing Flock. At trial, it was shown that Flock worked in sales and was trained in sales. Further, Flock admitted to almost everything that the victim said happened, except he testified that he believed the victim misinterpreted much of the incident. He admitted to making a statement to the victim about boyfriends, but disagreed as to the precise wording. He admitted to pulling victim's hair back and smelling it, but said that the victim misinterpreted his nose on her neck as a "peck" kiss. He admitted to putting his arms around the victim to pull her closer to brush her hair, but denied intentionally touching her lower abdomen for any sexual purpose. He conceded to having placed his hands on the victim's shoulders to ask her if she was in a comfortable sitting position, but denied rubbing them. Further, despite the fact that the victim's allegations "concerned [him] greatly," Flock merely gave police a six-line summary of the incident. The evidence and the reasonable inferences therefrom sufficiently support the prosecutor's argument that Flock was a "salesman," who claimed a misunderstanding.[55] Therefore, we conclude that the prosecutor's statements were not improper.

Flock also challenges the prosecutor's comment that "the only female that didn't get touched in that house that night while this was going on was the defendant's own wife." Flock argues that this statement was made to portray him as a bad husband and generally a bad person, and was, therefore, impermissible "bad character" evidence.[56] However, the prosecutor made the statement for the permissible purpose of proving intent.[57] To convict a defendant of CSC IV, the prosecution must prove sexual purpose.[58] The prosecutor's theory of the case was that Flock went into the bedroom to touch the victim because Ward rebuffed his sexual advances and his wife was upset with him. The evidence arguably supported the prosecutor's statement and

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[51] *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995).

[52] *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

[53] *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983) (internal citation omitted).

[54] *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

[55] See *Bahoda*, *supra* at 282; *Unger*, *supra* at 236.

[56] See MRE 404(b).

[57] MRE 404(b)(1).

[58] MCL 750.520a(q); MCL 750.520e(1).

theory of the case. The prosecutor based his comments on the evidence and reasonable inferences. In addition, the statements refuted defense counsel's argument that the touching was not done for a sexual purpose.[59]

E. Personal Beliefs

Flock argues that the prosecutor impermissibly interjected his personal beliefs regarding Flock's guilt into closing argument. The prosecutor stated, "But what do I know and why do I know this is for a sexual purpose or reasonably construed for a sexual purpose? His statements. Sniffing hair. Kissing her neck." Defense counsel objected, arguing that it is "improper for the prosecutor to say he knows or to vouch." The trial court agreed, and the prosecutor reworded the statement: "What evidence do we have to show reasonable (sic) construed for a sexual purpose? The evidence that we have to show is this; his statement, the hair, the smelling of the hair, the kissing of the neck, the rubbing of the arms, putting it here, whatever you want to call that."

Generally, "'[t]he prosecuting attorney should be permitted to argue the testimony, but has no right to state what he personally thinks or believes of [the] defendant's guilt, except as shown by proof.'"[60] While such vouching is impermissible, the use of the words "we know" or "I know" or "I believe" does not automatically signal improper vouching.[61] The inquiry is whether, by the words used, the prosecutor intended to vouch for a witness's character or place the prestige of his office behind his witnesses or the case.[62] Given the manner in which the prosecutor immediately rephrased the argument, it is clear that the prosecutor was arguing the evidence and reasonable inferences and not improperly vouching.

V. Ineffective Assistance Of Counsel

A. Standard Of Review

Flock argues that his defense counsel's failure to object to every instance of prosecutorial misconduct in a case with insufficient evidence to convict him constituted ineffective assistance of counsel.

In general, "[w]hether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."[63] This Court reviews a trial court's factual findings for clear error and

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[59] See *Unger*, *supra* at 238 (prosecution's statements should be read in light of defense counsel's statements).

[60] *People v Slater*, 21 Mich App 561, 566; 175 NW2d 786 (1970), quoting People v Hill, 258 Mich 79, 88; 241 NW 873 (1932).

[61] *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995).

[62] *Id*.

[63] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

reviews de novo questions of constitutional law.[64] However, because Flock failed to move for a new trial or request a *Ginther*[65] hearing, there was no hearing and no factual findings, and our review of the issue is limited to errors apparent on the record.[66]

B. Legal Standards

A defendant seeking a new trial on the ground that trial counsel was ineffective must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that it is reasonably probable that the outcome would have been different, but for counsel's errors.[67]

C. Applying The Standards

We conclude that defense counsel did not prejudice Flock by failing to object to every instance of alleged prosecutorial misconduct. As discussed under the issue above, the only challenged statement that constituted error and was not met with objection was the prosecutor's statement that the victim was "touched between the legs." However, defense counsel objected to this same characterization of the evidence when he objected to the following question posed by the prosecutor to the victim: "Has Mr. Flock ever accidentally put his hand between your legs before?" The trial court sustained the objection and the prosecutor reworded the question. The jury was therefore alerted to the false characterization. Further, any prejudice caused by the statement made during rebuttal was cured by the trial court's instructions.[68] Therefore, defense counsel's failure to object to the statement did not have a reasonable probability of changing the outcome of the trial.[69] Moreover, as discussed above, the evidence was sufficient to support Flock's conviction.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot

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[64] *Id*.

[65] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[66] *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

[67] *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

[68] *Unger*, *supra* at 234-235.

[69] *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).